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JAMES H. MCKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Brief of Prout for Appellant

No. 391.

Filed Mar. 31, 1902.

FRANK N. PROUT, ATTORNEY GENERAL OF THE STATE OF NEBRASKA,

Appellant,

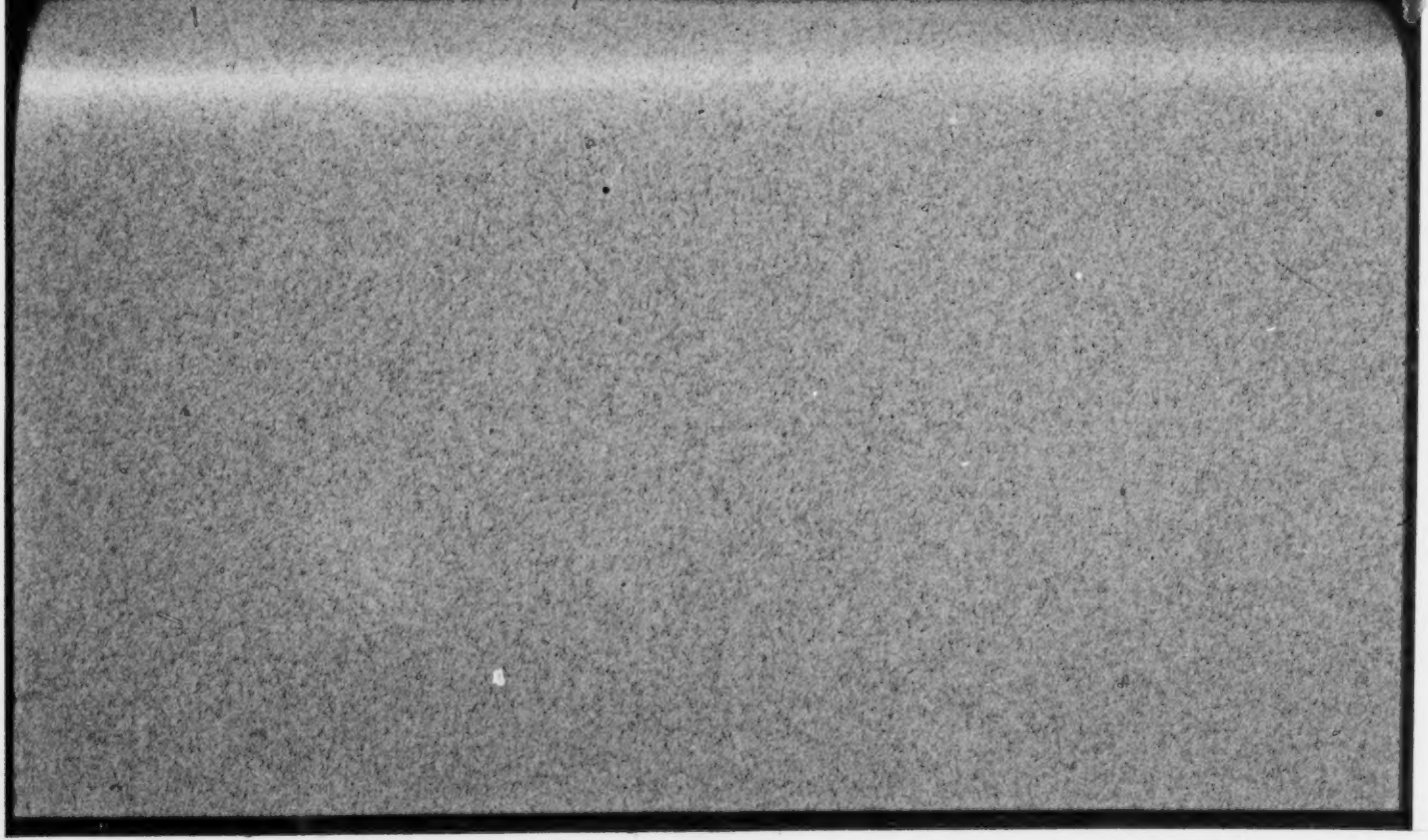
v.

JAMES C. STARR, SAMUEL W. ALLERTON, AND THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA. HEARD BELOW BEFORE SANBORN, CIRCUIT JUDGE, AND MUNGER, DISTRICT JUDGE.

BRIEF OF APPELLANT.

F. N. PROUT, *Attorney General, pro se.*



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BRIEF OF APPELLANT.

I.

Statement of the Case.

The court below, by the decree of which complaint is here made, perpetually enjoined the present attorney general of Nebraska from prosecuting in the supreme court of the state of Nebraska a suit instituted by the state March 10, 1900, to recover from the Chicago, Rock Island and Pacific Railway Company $310,000 as penalties for violations of the maximum freight law of Nebraska. This law went into effect June 8, 1893. It fixed maximum rates for transportation of freight upon the rail-

roads in Nebraska, required the carriers to reduce their charges to limits prescribed by the statute, and imposed penalties for violations of its provisions. (Compiled Statutes of Nebraska, ch. 72, art. 12.)

August 3, 1893, Samuel W. Allerton and James C. Starr, non-resident stockholders of the Chicago, Rock Island and Pacific Railway Company, filed in the circuit court of the United States for the district of Nebraska a bill of complaint upon which the United States circuit court made a temporary order restraining the said railway company from reducing its rates to those prescribed by the maximum freight law, on the ground that the statute is void, and, if enforced, would deprive the carrier of its right under the federal constitution to charge compensatory rates. By the same order the United States circuit court also restrained the Nebraska state board of transportation and the attorney general from taking any action to enforce the maximum freight law. In this suit in the circuit court the issues were joined October 3, 1893, but no further action was taken until April 6, 1901.

Without regard to the restraining order of the United States circuit court Constantine J. Smyth, as attorney general, brought suit in the supreme court of Nebraska March 10, 1900, on behalf of the state of Nebraska to recover from the Chicago, Rock Island and Pacific Railway Company $310,000, as penalties for violations of the maximum freight law. This suit for penalties was pending when the present attorney general went into office January 3, 1901. February 15, 1901, defendant filed in the state supreme court a motion to dismiss the suit for penalties on the ground that prosecution thereof was forbidden by the United States circuit court. The motion was overruled. (Printed Record p. 44; *State v. Chicago, R. I. & P. R. Co.*, 85 N. W., 556.) April 6, 1901, Samuel W. Allerton and James C. Starr filed a supplemental bill of complaint in their former suit in said circuit court,

praying that the original order entered therein in said cause be extended to the present attorney general, and that he be particularly enjoined and restrained from further prosecuting the said suit for penalties. To the supplemental bill of complaint the attorney general filed a demurrer, assigning the following grounds therefor:

"1. That this honorable court has no jurisdiction of the action alleged in said bill of complaint, for the following reasons:

"(*a*) That this defendant is complained against in his official capacity as attorney general of the state of Nebraska, and not in his individual capacity as a citizen thereof.

"(*b*) That the real party in interest defendant is not this demurring defendant, but the sovereign state of Nebraska, whose officer he is and as whose agent he is acting, all of which appears by the said complainants' supplemental bill of complaint herein filed.

"(*c*) That this supplemental action is in contravention of the eleventh amendment to the constitution of the United States, which provides: 'The judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'

"2. That it appeareth by the plaintiffs' own showing by said supplemental bill that they are not entitled to the relief prayed by said bill against this defendant."

The demurrer was overruled. (Printed Record p. 53.) The attorney general elected to stand upon his demurrer, and a decree was entered perpetually enjoining him from prosecuting the suit for penalties. (Printed Record p. 56.) It is of this decree appellant complains.

II.

Argument.

A suit to enjoin the attorney general of the state of Nebraska from prosecuting an action in the name of the state of Nebraska to recover from a railroad company penalties for violations of the maximum freight law is a suit against the state within the meaning of the eleventh amendment to the federal constitution, which provides that the judicial power of the United States shall not extend to suits against a state, and such a suit is therefore not within the jurisdiction of the federal courts.

The question presented by the record is: Has the circuit court of the United States jurisdiction to enjoin the attorney general of the state of Nebraska from prosecuting in the supreme court of the state of Nebraska a suit instituted by the state to recover from a common carrier operating within the state penalties for violations of a statute enacted by the legislature of the state? It is insisted that in passing upon this question the validity of the statute should not be considered. If the maximum freight law of Nebraska violates any provision of the federal constitution it will be declared void by the supreme court of Nebraska when that question is presented in the case of the State of Nebraska against the Chicago, Rock Island & Pacific Railway Company; but if the state court should hold that the statute does not conflict with the organic law of the nation, complainants may have the judgment reviewed upon writ of error in this court. The duty of state courts to uphold the fundamental law of the United States is no less imperative than that of the federal courts. In *Fitts v. McGhee*, 172 U. S., 532, it was said by this court:

"The plaintiffs state that the toll-gatherers in their service had been indicted in a state court for violating the provisions of the act of 1895 in respect to tolls. Let them appear to the indictment and defend themselves

upon the ground that the state statute is repugnant to the constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. (*Robb v. Connolly*, 111 U. S., 624.) And if the question is determined adversely to the defendants in the highest courts of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court."

The United States circuit court attempted to enjoin the attorney general from prosecuting in the supreme court of the state of Nebraska a suit entitled, "The State of Nebraska against The Chicago, Rock Island & Pacific Railway Company." In that suit the state prays for judgment against defendant for $310,000 for penalties for violations of a state law. In case of recovery the money will be paid into the state treasury as funds of the state. The attorney general has no interest in the funds. The suit can only be prosecuted by that officer, and if the injunction is valid, the state is as effectually enjoined as if it had been one of the parties directly restrained by the writ. The right of the state to be exempt from suits cannot be defeated by instituting actions against state officers charged with the duty of enforcing penalties against those who violate the laws of the state.

The question here presented was submitted to the supreme court of Nebraska in the suit the prosecution of which is forbidden by the decree assailed on this appeal. On motion to dismiss the suit for penalties the state court held that the preliminary restraining order of the federal court, "to the extent that it assumes to forbid the institution and prosecution of actions like the present one, is utterly and absolutely null," and that "the eleventh amendment to the federal constitution would be effectu-

ally emasculated if it were permissible to enjoin or coerce the agents through which a state performs its corporate functions." The head-notes and opinion by SULLIVAN, J., on the motion, are as follows (*State v. Chicago, R. I. & P. R. Co.*, 85 N. W., 556):

"1. An injunction issued by the circuit court of the United States cannot lawfully forbid the attorney general from suing for penalties claimed by the state under section 9 of the maximum freight law. (Compiled Statutes, ch. 72, art. 12.)

"2. It is a maxim of general jurisprudence that a party is not concluded by a judgment or decree rendered in an action to which he was not a party.

"3. The judicial power of the United States does not extend to actions brought by individuals or corporations against a state.

"4. A party is not released from his obligations to A because B has, by injunction or otherwise, prevented him from performing that obligation.

"SULLIVAN, J.: This is an action instituted in this court by the state to recover of the defendant company certain penalties claimed to be due under the act of 1893, known as the 'maximum freight law.' The defendant answered alleging that the attorney general had been enjoined by the circuit court of the United States for the district of Nebraska, from commencing or prosecuting any action under the provisions of said law. This allegation was constructively admitted and, thereupon, the defendant moved for judgment on the pleadings. The motion was submitted on the 5th inst., and taken under advisement. We have given the question in controversy considerable attention, and we are all of the opinion that the application for judgment should be denied.

"The preliminary order of the federal court is binding only on the parties to the action in which it was issued. To the extent that it assumes to forbid the institution and prosecution of actions like the present one, it is utterly and absolutely null. The judicial power of the United States does not extend to any suit in law or equity brought either by a natural person or a corporation against a state. The circuit court was therefore without power or author-

ity to enjoin the state, either directly or indirectly, from suing in its corporate capacity to recover a sum of money claimed to be due it as penalties under the maximum freight law. It is not only an unquestioned rule of the common law, but a maxim of general jurisprudence, that no one is concluded by a judgment or decree rendered in a case to which he was not a party. The state, in its corporate character, had no interest whatever in the suit in the federal court, and consequently the provisional injunction was ineffectual as to it, and equally ineffectual as to the attorney general and other officers or agents through which it must necessarily act in asserting its rights in courts of justice. The attorney general was not enjoined on the theory that he was acting as the agent of the state, but on the theory that he was acting without lawful authority from any source—that in attempting to enforce, for the benefit of the general public, the schedule of charges prescribed by the act of 1893, he was proceeding under color of an unconstitutional law, and was, therefore, individually liable as a wrong-doer. The writ operated upon him personally, and not upon him as an organ of the state. The eleventh amendment to the federal constitution would be effectually emasculated if it were permissible to enjoin or coerce the agents through which a state performs its corporate functions. Restraint or coercion of the agent would be, in everything but form, restraint or coercion of the principal.

"That the state is entitled to prosecute this action to judgment is a proposition abundantly supported by decisions of the supreme court of the United States; and it is almost needless to add that the right to sue includes the right to act through the attorney general. (*Louisiana v. Jumel*, 107 U. S., 711; *Cunningham v. Railroad Co.*, 109 U. S., 446; *Hagood v. Southern*, 117 U. S., 52; *In Re Ayers*, 123 U. S., 443; *Reagan v. Farmers' L. & T. Co.*, 154 U. S., 362; *Scott v. Donald*, 165 U. S., 58; *Harkrader v. Wadley*, 172 U. S., 148; *Fitts v. McGhee*, 172 U. S., 516; see also *McWhorter v. Pensacola & A. R. Co.*, 5 South. (Fla.), 129, and *Marshall v. Clark*, 22 Tex., 23.)

"The fact that the defendant has submitted to the injunction issued against it is of course no defense. If it has been rightfully enjoined, then the state cannot succeed in this action and no harm will be done; but if the

injunction was wrongfully issued the company must pay the penalties that have accrued to the state, and look to the injunction bond for indemnity. A party is not released from his obligation to A because B has, by injunction or otherwise, prevented him from performing that obligation.

"There may be another reason why the injunction against the attorney general is not valid. It was issued by the United States district judge in 1893, and it does not appear that it has been continued *in force* by the circuit court. It is our understanding that an order of this kind does not possess such extraordinary vitality; but as the point was not at all discussed by counsel at the bar, or in the briefs, we do not make it to any extent the basis of our decision. The motion for judgment is denied."

The following cases were cited by Judge SULLIVAN to sustain his ruling that the federal court is without jurisdiction to enjoin the attorney general from prosecuting in the state court the suit brought in the name of the state to recover penalties:

In *Fitts v. McGhee*, 172 U. S., 516, the report of the case shows that the circuit court of the United States enjoined the attorney general of Alabama from enforcing a statute fixing maximum rates of toll on a railroad bridge. The act was passed February 9, 1895. Relief was granted on the ground that the act violated the federal constitution in denying to the railroad company the right to charge rates of toll that were fairly and reasonably compensatory. On review in this court it was held that the action was a suit against the state, and that therefore the circuit court had no jurisdiction. The opinion was delivered by Mr. Justice HARLAN, who made use of the following language:

"As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record."

In *Louisiana v. Jumel*, 107 U. S., 723, it was shown that under statutory and constitutional provisions, the state of Louisiana issued and negotiated bonds, fixed the rate of interest, and provided for the creation of a fund for payment. By subsequent constitutional amendment the state attempted to change the terms of interest fixed in the bonds. Bondholders instituted actions to prevent the state officers from diverting the money created under the original enactments to purposes other than those for which the fund was created. Relief was sought on the ground that the state was forbidden by the federal constitution to impair the obligation of its contracts. The actions were defended on the theory that the eleventh amendment to the federal constitution exempted the state from suit. Though the state was not a party, this court affirmed the order of the trial court dismissing the suits, on the ground that it had no jurisdiction. It was said in the opinion:

"The officers owe duty to the state alone, and have no contract relations with the bondholders. They can only act as the state directs them to act, and hold as the state allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the state, or that they should have any control over this fund except to keep it like other funds in the treasury, and pay it out according to law. They can be moved through the state, but not the state through them."

Cunningham v. Macon & B. R. Co., 109 U. S., 446, was a suit to foreclose a mortgage against a railroad company and to set aside a sale to the state of Georgia under foreclosure of a prior mortgage. Though the state officers were defendants, a judgment of dismissal was affirmed on the ground that the entire interest adverse to plaintiff was the interest of the state of Georgia, and the federal courts were without jurisdiction in suits prosecuted against the state. Mr. Justice MILLER made use of the following language:

"Whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though some interest of hers may be more or less affected by the decision."

In *Hagood v. Southern*, 117 U. S., 52, the trial court, by decrees against state officers, attempted to specifically enforce the contract obligations of the state in relation to revenue bond script. In setting aside the decrees, it was said by Mr. Justice MATTHEWS:

"The defendants in the present cases, though officers of the state, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the state cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy, to which the state is an indispensable party, without its presence. This, however, the circuit court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the court against the state through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit."

In *Re Ayers*, 123 U. S., 497, the following language was used:

"The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia, in its own name and for its own use. If the state had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing

that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its governor and attorney general, according to the precedents in such cases. *New Jersey v. New York*, 5 Pet., 284, 288, 290; *Kentucky v. Dennison*, 24 How., 66, 96, 97; Rule 5 of 1884, 108 U. S., 574. If a decree could have been rendered enjoining the state from bringing suits against its tax-payers, it would have operated upon the state only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its attorney general, and the commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment.

"The nature of the case as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the state is not named as a defendant. How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362, recognizes the rule that the court does not acquire jurisdiction "where the suit is brought against the officers of the state, as representing the state's action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts."

In *Harkrader v. Wadley*, 172 U. S., 143, the report shows that defendant had been indicted in Virginia, in a state court; that he had been in custody of a county sheriff; that the circuit court by injunction restrained the state officers from further prosecution of defendant under the indictment; that the injunction was disre-

garded, and custody of defendant retained; and that the federal court subsequently discharged him on habeas corpus. On review in this court defendant's custody was restored to the county sheriff, the court saying:

"A circuit court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a state to enforce the criminal laws of such state."

While this court is not bound by the ruling of a state court on a federal question, I have been constrained to present the able opinion of the Nebraska supreme court as worthy of consideration here, not only on account of the great learning of the judge delivering it, but also because of its intrinsic merit and the array of federal precedents with which he has fortified his conclusion that the federal court has no jurisdiction to enjoin the attorney general of Nebraska from prosecuting a suit in the name of the sovereign state to collect penalties for a violation of its laws.

For the reasons stated it is insisted that the decree below should be reversed and the suit in the circuit court dismissed.

Respectfully submitted,

F. N. PROUT,
Attorney General.

LINCOLN, NEBRASKA, March 24, 1902.